

# Pay-Per-Call Legal Advice, Professional Integrity, and Legal Licenses: Why 1-900-Lawyers is a Call to the Wrong Number

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## COMMENTS

### **PAY-PER-CALL LEGAL ADVICE, PROFESSIONAL INTEGRITY, AND LEGAL LICENSES: WHY 1-900-LAWYERS IS A CALL TO THE WRONG NUMBER**

#### I. INTRODUCTION

Since their genesis, pay-per-call phone lines have been used for services ranging from stock quotes to horoscopes, product information to weather forecasts, and news headlines to soap opera updates.<sup>1</sup> The pay-per-call industry has developed a bad reputation, however, because of its image as a medium for phone sex and for taking advantage of classes of persons (e.g., children and the elderly) who do not understand the nature of pay-per-call services. Irrespective of the reputation of the pay-per-call industry, lawyers have recently jumped on its bandwagon by selling their services through 900-numbers.

Originators of pay-per-call legal advice lines argue that they are providing affordable and easily accessible legal advice to a large segment of the population that ordinarily would not use legal services. Assuming this argument is true, potential providers of pay-per-call legal advice must consider two other important factors when deciding whether to implement a 900 service: the reputation of the legal profession and the status of their own professional licenses.

Part II of this Comment will trace the history of the pay-per-call industry, including the history of pay-per-call legal advice lines. Part III will discuss the financial, societal, and utilitarian advantages and disadvantages of a lawyer's use of a 900 number. Part IV will discuss the recently enacted regulations with which a lawyer must comply in using a 900 number. Part V will discuss the ethical implications of an attorney's use of a 900 number. Finally, Part VI will analyze whether the benefits provided by pay-per-call legal advice lines are outweighed by the possible damage to the reputation of the legal profession. This Comment will conclude that attorneys need to exercise constraint in using 900 numbers to protect the integrity of the profession and potentially their own professional licenses.

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1. Edmund L. Andrews, *Expanding The Uses of '900' Services*, N.Y. TIMES, Aug. 10, 1991, at 34.

## II. BACKGROUND OF THE PAY-PER-CALL INDUSTRY

### A. *What is a Pay-Per-Call Service?*

Pay-per-call services (also known as audiotext or 900 services) allow callers to receive an assortment of information services by calling a 900 number.<sup>2</sup> When using a 900 number, the caller is charged a fee in addition to the ordinary long-distance charges.<sup>3</sup> Consumers are usually charged either a flat fee per call or a per minute rate, with fees rising as high as \$25 per call or \$10 per minute.<sup>4</sup>

In initiating a 900 service, the information service provider contracts with a communication carrier, usually a long-distance company, to provide a particular service.<sup>5</sup> The local telephone company allows the information service provider to use telephone lines and also handles the billing and collection of the service provider's accounts.<sup>6</sup>

### B. *Evolution of Industry and Non-lawyer Use*

AT&T introduced the first 900 service in 1980.<sup>7</sup> The original service, "Dial-It 900," was a passive service: the caller was limited to listening to a prerecorded message.<sup>8</sup> Later improvements to the 900 system allowed callers to be polled during the Carter-Reagan debates and listen to the astronauts chatter during the first space shuttle flights.<sup>9</sup>

The capabilities of 900 services have broadened significantly with today's advances in technology.<sup>10</sup> No longer are 900 service providers limited to passive services. A caller can now link to an interactive service and talk to a live operator or make choices using the numbers of a touch-tone phone when directed by a voice processor.<sup>11</sup>

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2. S. REP. NO. 190, 102d Cong., 1st Sess. 1 (1991) [hereinafter Senate Report]. Pay-per-call services also consist of 10-digit numbers with a 700 prefix and 7-digit numbers with a 976 prefix. Senate Report at 1. This Comment will focus, however, on 900 numbers.

3. *Id.*

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. H.R. REP. NO. 430, 102d Cong., 2nd Sess. 3 (1992) [hereinafter House Report].

8. *Id.* In addition, if a person called the service in the middle of a message, he or she needed to wait until the completion of the message to hear the beginning. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

The pay-per-call concept has created a multi-million dollar industry for its many providers.<sup>12</sup> Today's 900 number providers are offering a diverse variety of information and services.<sup>13</sup> Industry experts forecast that in the near future businesses will use pay-per-call services, along with or in place of toll-free numbers, for sales, market research, and other applications.<sup>14</sup>

### C. *Lawyers Aim for Their Piece of the Pie*

In October 1989, Michael Cane of Huntington Beach, California, founded the nation's first lawyer pay-per-call hotline.<sup>15</sup> The legal hotline, dubbed "Tele-Lawyer," charges \$3 per minute to answer questions about a variety of legal subjects.<sup>16</sup> The average call lasts approximately ten minutes, most of which involves the client describing his or her problem to the lawyer.<sup>17</sup> The lawyer can answer many questions immediately, and for other questions the lawyer uses a

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12. In 1991, a group of State Attorneys General projected that the growth of the audiotext industry would continue at a rapid pace, "from its current status as an approximately \$750 million industry to a \$1.6 billion industry by 1992." *Id.* at 3-4 (quoting Attorney General Working Group, The 900 Report, Findings and Preliminary Recommendations, National Association of Attorneys General (Mar. 1991)). Approximately 5,000 different service providers offered about 14,000 different pay-per-call programs in 1991. Senate Report, *supra* note 2, at 2.

13. For example, political campaigns, charitable organizations, and others are using audiotext services for fund-raising. House Report, *supra* note 7, at 3. Pay-per-call numbers are also used to provide stock quotes, sports data, advice, and mass announcements, conduct polls, and sell goods. Categorically, about 60 percent of these services provide entertainment, 20 percent allow interaction with a live operator, 5 percent conduct polls, 3 percent provide information, and 2 percent raise funds. Senate Report, *supra* note 2, at 2. "Dial-a-porn" services only account for about 4 percent of the industry. Laurent Belsie, *Pay-Per-Call Services Ringing Up Lots of Flak*, CHRISTIAN SCI. MONITOR, Oct. 30, 1991, at 9.

14. House Report, *supra* note 7, at 3. "The industry has graduated from an entrepreneurial one dominated by fortune seekers not concerned with long-term viability to a more corporate oriented business," according to Rick Parkhill, the executive publisher of the pay-per-call industry's leading trade journal. Richard D. Hylton, *All About Pay-Per-Call Lines; For 900 Numbers, the Racy Gives Way to the Respectable*, N.Y. TIMES, Mar. 1, 1992, at 8. See Larry Armstrong and Peter Coy, *900 Numbers Are Being Born Again*, BUS. WK., Sept. 17, 1990, at 144 (discussing the increased use of 900 numbers by businesses).

15. Ronica Roth, *Could You Offer Drive-up Legal Advice?*, THE COMPLEAT LAW., Summer 1990, at 23.

16. *Id.* Callers most frequently have questions about family law (18 percent of calls), bankruptcy law (17 percent), real estate or landlord-tenant rights (16 percent), and small business problems (16 percent). Bill Grady et al., *Firm Puts Legal Advice on the Line*, CHI. TRIB., Jan. 15, 1991, at C3.

17. *Id.* The client also needs to wait an average of 47 seconds for the call to be transferred to the proper lawyer. *Id.*

computer database to find an answer to the problem.<sup>18</sup> If a question cannot be answered immediately on the phone, the lawyer researches the problem at no additional cost and calls the client back.<sup>19</sup>

The pay-per-call legal hotline concept has proved to be successful.<sup>20</sup> As of 1991, Tele-Lawyer had grown to employ twelve attorneys who answered questions for 5,000 clients.<sup>21</sup> The number of attorney hotlines has grown steadily since Tele-Lawyer's arrival in 1989.<sup>22</sup> In 1994, an American Bar Association expert estimated that a dozen law-based pay-per-call lines existed throughout the nation.<sup>23</sup> The legal profession's use of 900 numbers is not limited to advice lines, however, as the number of uses for 900 lines in the legal community seems only to be limited by the imagination of the lawyers originating the services. Today, pay-per-call services are being used by lawyer-referral services, ethics boards, and courts.<sup>24</sup> Although one might perceive that pay-per-call legal advice lines are a product of America's reputed "anything for a dollar" philosophy, these hotlines are not a strictly American

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18. *Id.*

19. *Id.* Please note that the billing methods of attorney hotlines probably differ from one to the next. Tele-Lawyer's method is discussed only as an example of how one hotline is operated.

20. For example, Law Line, operated in California since April of 1992, has been profitable since its inception. Alan Rider, *1-900-Buy Info: Selling Information or Professional Advice Over a 900 Phone Line Is a Good Way to Expand a Business*, HOME OFF. COMPUTING, Mar. 1993, at 38. See Robert Kuntz, *1-900-PROFITS*, LEGAL TIMES, Feb. 11, 1991, at 2 (discussing gross profits of legal pay-per-call services).

21. Todd Woody, *A New Approach to House Calls*, THE RECORDER, June 12, 1991, at 1.

22. "I think it's the wave of the future. The gap between those who can afford good legal services and those who can't is widening quicker than the Bar thinks." *Id.* (quoting Lowell Richards, an attorney who started a national attorney hotline in 1990).

23. Jeffrey Gold, *Dial-A-Lawyer Will Dispense Legal Advice at \$3.99 a Minute*, THE RECORD, May 23, 1994, at A5. Of these lines, four exist in California (Woody, *supra* note 21, at 1); one in Houston, one in Georgia (Gary Taylor, *Dial-a-Lawyer*, THE NAT'L L. J., Dec. 17, 1990, at 2). Lawyers also peddle their services through 900 numbers in Illinois, Florida, and Maryland. See Kuntz, *supra* note 20, at 2.

24. See Woody, *supra* note 21, at 1 (lawyer-referral services); Stephen W. Townsend, *Proposed Disciplinary Oversight 1995 Operating Budget*, N.J.L.J., Nov. 28, 1994, at 2 (ethics boards); and Jerry Gillam, *California Laws '95*, L.A. TIMES, Jan. 2, 1995, at A3 (courts). Some may argue that a more appropriate legal-related use of 900 numbers is presented by the Shark Line, where callers pay \$1.49 per minute to hear lawyer jokes. Colin Covert, *Lawyers Bashed in Ads, Movies, Books and Jokes*, STAR TRIB. (Minneapolis), May 29, 1994, at 9E. The Shark Line, owned by Doantsumi Corp. (pronounced "don't sue me"), debuted on April 1, 1994, and received more than 500 calls in its first two weeks. *Id.*

phenomena. One attorney has started a legal line in Montreal,<sup>25</sup> and the idea has been discussed in Britain.<sup>26</sup>

### III. ADVANTAGES AND DISADVANTAGES OF A LAWYER'S USE OF A 900 NUMBER

A 900 line offers many advantages and disadvantages that an attorney needs to consider when deciding whether to implement a pay-per-call service. This section will focus mainly on the economic, societal, and utilitarian impact of an attorney's use of a pay-per-call service.<sup>27</sup>

#### A. Advantages

One major benefit of legal advice lines is their convenience to consumers. First, because approximately ninety-three percent of all households have telephone service,<sup>28</sup> pay-per-call services allow convenient access to legal advice to a large segment of the population. If these consumers perceived that they would need to travel to an attorney's office to receive legal advice, or in the alternative, have an attorney travel to their homes in order to receive this advice, the additional inconvenience to consumers may lead them to not seek legal advice. Accordingly, the additional convenience that legal advice lines present probably leads more consumers to obtain legal counseling.<sup>29</sup>

Second, legal audiotext services are convenient to consumers because of the short time it takes for the consumer to receive the advice. Calls average ten minutes,<sup>30</sup> and some legal hotlines create special

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25. Lisa Fitterman, *Dialing for Dollars*, THE GAZETTE (Montreal), Nov. 15, 1994, at A3. The Montreal line employs twelve lawyers who answer questions for \$30 per call. The service answers all questions except those pertaining to constitutional, tax, international, airline, and maritime law. *Id.*

26. Scrivenor, *Dial for Advice*, THE TIMES (London), July 19, 1994, available in LEXIS, Nexis Library, TTIMES File. Although no lawyer has started a legal hotline in Britain, the Law Society has said it probably would not stop the implementation of such a line if the advertisement stated the cost of the service and was not misleading. *Id.*

27. This section does not contemplate the most obvious benefit of 900 number use: to make money. For a discussion of the profitability of legal audiotext services, see *supra* note 20.

28. House Report, *supra* note 7, at 4.

29. According to a regular Tele-Lawyer user: "It's a big asset for me to be able to pick up the phone at a moment's notice and get an answer to my question." Kelly Barron, *Fast-Talking Lawyers*, ORANGE COUNTY BUS. J., Dec. 3, 1990, at 1. "The callers I get are people who need legal advice but would never show up in a traditional law practice because of the expense, the inconvenience, or the stigma," says attorney Cheryl Meade, who opened a legal advice line in April of 1992. Rider, *supra* note 20, at 38.

30. Grady, *supra* note 16, at C3.

databases so that their lawyers can answer commonly-asked questions more quickly than if they were consulting a general, commercially-available legal database.<sup>31</sup> A conventional attorney's office is not equipped to answer simple questions in such a short period of time.<sup>32</sup>

Another benefit to using a 900 number is that the telephone company handles the billing for the attorney, relieving the attorney of the task of collecting on the account.<sup>33</sup> The collection of pay-per-call accounts is facilitated by the regulatory framework of the Federal Communications Commission ("FCC") imposed on the pay-per-call industry. A "common carrier" or "information provider" can block its interstate pay-per-call programs from customers who have not paid legitimate pay-per-call charges.<sup>34</sup> The common carrier cannot, however, disconnect or interrupt a telephone subscriber's local or long distance service because the subscriber has failed to pay for his or her use of pay-per-call services.<sup>35</sup>

An attorney also benefits from using a 900 line because a pay-per-call service is an inexpensive way of reaching a large population base.<sup>36</sup> Consumers are able to shrink the market available to pay-per-call marketers, however, as local exchange carriers are required to allow subscribers the option to block access to 900 services.<sup>37</sup>

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31. See Rider, *supra* note 20, at 38.

32. Roth, *supra* note 15, at 23. Roth argues that "[an attorney] can't afford to spend just 15 minutes with someone only to advise against a lawsuit." *Id.*

33. Rider, *supra* note 20, at 38. The ability of pay-per-call providers to bill through the telephone company was effectuated by the break-up of AT&T. House Report, *supra* note 7, at 4. For a discussion of the process by which the pay-per-call provider can bill through the telephone company, see *id.*

34. 47 C.F.R. § 64.1512 (1993). An information provider cannot block service, however, when the subscriber has a complaint pending against the information provider. *Id.* The complaint must be filed in compliance with procedures established by the Federal Trade Commission under Title III of the Telephone Disclosure and Dispute Resolution Act ("TDDRA").

35. 47 C.F.R. § 64.1507.

36. Rider, *supra* note 20, at 38. According to a 1991 report, the inexpensive and simple means by which one can tap into a nationwide market is the reason for the growth of the pay-per-call industry. Senate Report, *supra* note 2, at 2 (citing ATTORNEYS GENERAL WORKING GROUP, THE 900 REPORT, FINDINGS AND PRELIMINARY RECOMMENDATIONS, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (Mar. 1991)).

37. 47 C.F.R. § 64.1508(a). Blocking must be offered only where technically feasible, and must be offered, at no charge, for a period of 60 days after a subscriber receives a new telephone number. *Id.* § 64.1508(a). If a customer wants 900 service to be blocked after the 60 day time period has expired, or if the customer wants the service unblocked, the local exchange carrier may charge a reasonable fee. *Id.* § 64.1508(b).

Finally, pay-per-call legal service providers believe that they benefit society by providing legal services to the middle class, which is sometimes harmed by inaccessibility to legal advice.<sup>38</sup> According to the founder of Tele-Lawyer: "Low-income families often qualify for free legal aid, and the wealthy can afford lawyers' fees. But the middle class often is priced out of the legal process."<sup>39</sup>

### B. Disadvantages

The use of 900 numbers in the sale of legal services is not without its drawbacks. One serious detriment in using a 900 number is the general reputation of the pay-per-call industry. Because of the ease of implementing a 900 number and charging through the telephone industry's billing system, the pay-per-call industry came to be known as "one of the most significant vehicles for consumer fraud in recent history."<sup>40</sup> Purveyors of fraudulent pay-per-call services can charge outrageous rates for cheap goods and worthless services, and frequently the consumer does not comprehend the extreme cost of the service until receiving the telephone bill.<sup>41</sup> In addition, service providers have frequently targeted children, the undereducated, and the unemployed: demographic groups that many times are unable to comprehend the nature of the costs involved in calling a 900 number.<sup>42</sup>

The reputation of 900 numbers, coupled with a general suspicion of lawyers, is a serious obstacle for the legal advice lines to overcome.<sup>43</sup> Some service providers attempt to overcome this distrust of 900 numbers by providing quality service and giving advice without the hidden motive of receiving paid referrals or an office visit from the phone client.<sup>44</sup> Some people fear, however, that unscrupulous attorneys will establish "boiler-room" pay-per-call operations with no accountability to users,

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38. Roth, *supra* note 15, at 23.

39. *Id.* For a discussion of the legal needs of the middle class, see generally Quintin Johnstone, *Lawyer Obligations to Moderate-Income Persons*, 21 CAP. U. L. REV. 845 (1992); Talbot D'Alemberte, *Calling the Roll of Lawyers: Providing Service to All*, 21 CAP. U. L. REV. 861 (1992).

40. House Report, *supra* note 7, at 4.

41. *Id.*

42. *Id.*

43. Roth, *supra* note 15, at 23.

44. *Id.* Despite these efforts, some consumers still are wary of business-related 900 numbers. According to Tele-Lawyer's founder, his years in the pay-per-call business "have been like selling toothpaste in the 1850s. People think, 'Hey, that's a nice idea,' but they don't know how to use it." Karen Padley, *More Companies Are Embracing '900' Phone Service*, INVESTOR'S BUS. DAILY, Oct. 9, 1991, at 10.



especially those who live outside of the state in which the service exists.<sup>45</sup> Only time will tell whether attorneys are able to escape the stigma of the pay-per-call industry.

Several consumer advocates also question whether pay-per-call legal lines are cost effective for consumers.<sup>46</sup> Some have suggested that, before using a pay-per-call service, consumers should consult with The Legal Aid Society, the American Bar Association's prerecorded legal advice service, prepaid legal groups,<sup>47</sup> or local bar associations.<sup>48</sup>

Additionally, some critics of the pay-per-call legal lines question whether an attorney is able to adequately answer questions from a wide range of legal disciplines in such a short period of time.<sup>49</sup> This potential problem is compounded by the fact that several legal advice lines have been unable to obtain insurance for malpractice, thereby opening the door for misserved clients to hold legal service providers individually responsible.<sup>50</sup>

#### IV. REGULATION OF THE PAY-PER-CALL INDUSTRY

The thrust of the recently-enacted regulations of the pay-per-call industry is aimed at the industry's bad actors. Presuming all legal advice lines are designed to aid and not exploit the public, these laws and regulations will not materially affect the existence of legal hotlines. These regulations need to be discussed, however, for two reasons. First, the regulations will probably affect the means by which most legal advice lines are marketed and operated. Second, and probably more importantly, if these regulations are effective in eliminating the abusive practices of service providers, the image of the audiotext industry may

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45. Woody, *supra* note 21, at 1.

46. According to Ken McEldowney, a San Francisco consumer advocate: "The cost can be quite high for someone who has a basic question. If they're on the line for five or ten minutes it might be cost-effective. But if the calls are much longer, you're getting into the area of real money, and some face-to-face contact might be preferable." *Id.*

47. Barron, *supra* note 29, at 1.

48. Janet Pearson, *Bar to Investigate Telephone Legal Service*, TULSA WORLD, Dec. 14, 1990, at A17. For example, the Tulsa County Bar Association allows a person to consult with three different attorneys for a half-hour each for a fee of \$20. *Id.*

49. Sue Yang, the chairperson of New Jersey's Committee on Lawyer Advertising, maintains that "[n]o attorney has such a broad grasp of the law that he or she could provide meaningful advice to all the possible kinds of callers." Jeffrey Kanige, *Panel OKs 900 Numbers*, N.J.L.J., May 2, 1994, at 4. Yang also contends that "a 15-minute conference could not provide sufficient facts to provide a proper consultation." *Id.*

50. Woody, *supra* note 21, at 1. Says one legal hotline originator: "Every malpractice carrier I talked to was afraid of it. I can't say I'm not concerned about it because it's taking a hell of a chance." *Id.*

improve to the point where pay-per-call legal advice lines do not materially affect the image of the legal profession.

A. *The Telephone Disclosure and Dispute Resolution Act*  
("TDDRA")<sup>51</sup>

Bad publicity surrounding the unscrupulous use of pay-per-call lines retarded the industry's growth.<sup>52</sup> Although retail billings of the pay-per-call industry jumped from \$60 million in 1988 to \$445 million in 1989 and doubled to \$880 million in 1990, 1991's billings were limited to \$975 million, an increase of only twenty percent.<sup>53</sup> Legitimate pay-per-call providers hoped that Congress would pass a bill that would "weed out dishonest providers and instill consumer confidence in pay-per-call services."<sup>54</sup> Congress provided the TDDRA, which was signed into law on October 28, 1992.<sup>55</sup>

The general purpose of the TDDRA is to establish national standards for the pay-per-call industry; guarantee that audiotext services give callers sufficient information before callers decide to incur the expense; and furnish the states, Federal Communications Commission ("FCC"), and Federal Trade Commission ("FTC") with the authority necessary to safeguard pay-per-call customers.<sup>56</sup> The TDDRA required

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51. Pub. L. No. 102-556, 106 Stat. 4181 (1992).

52. Mike Mills, *House OKs Bill That Would Put Preamble on 900-Number Calls*, CONG. Q., Feb. 29, 1992, at 463.

53. *Id.* "There are bad actors in the industry that have discouraged people from using these services," stated Steven J. Metalitz, vice president of the Information Industry Association. *Id.*

54. *Id.* Edward J. Market, D-Mass., chairman of the House Energy and Commerce Telecommunications Subcommittee stated: "Legitimate services are penalized by the actions of the few. We can punish the hucksters while allowing legitimate business people to move forward." *Id.*

55. The House passed its original 900 number bill on February 25, 1992, by a vote of 381 to 31. The Senate passed the bill by a voice vote on October 7, 1992. *Issue: Telephone Consumer Protection*, CONG. Q., Oct. 31, 1992, at 3468. President Bush signed the bill although his administration argued that the bill was unnecessary because federal agencies, such as the FCC, had already enacted regulations that accomplished the same goals as the bill. Mills, *supra* note 52, at 463. For a discussion of the previously enacted regulations of the pay-per-call industry, see William W. Burrington & Thaddeus J. Burns, *Hung Up on the Pay-Per-Call Industry?: Current Federal Legislative and Regulatory Developments*, 17 SETON HALL LEGIS. J. 359, 381-386 (1993).

56. Burrington & Burns, *supra* note 55, at 388. Although an analysis of state regulation of the pay-per-call is beyond the scope of this Comment, several states have enacted legislation that controls intrastate pay-per-call services to approximately the same extent that the federal regulations control interstate services. For a discussion, see Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE

both the FCC and FTC to promulgate regulations within 270 days of its passage.<sup>57</sup>

### *B. Federal Communications Commission Regulations*

The FCC regulations of the pay-per-call industry became effective, for the most part, on August 25, 1993.<sup>58</sup> These regulations were amended in part effective October 12, 1994.<sup>59</sup> Although the FCC's regulations are directed toward common carriers providing pay-per-call services, several of these regulations affect the methods by which lawyers can sell their services through 900 numbers.<sup>60</sup>

Most of the FCC regulations affecting lawyer's information services concern the content of the contract or tariff between the common carrier and the pay-per-call service provider.<sup>61</sup> The contract must require that the information provider comply with Titles I, II, and III of the TDDRA, and with the FTC's regulations enacted pursuant to the TDDRA.<sup>62</sup> The contract also must specify that a pay-per-call provider

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L. REV. 1029, 1035-36 (1992).

57. 47 U.S.C. § 228(b)-(c) (Supp. 1993) (FCC regulations); 15 U.S.C. § 5711(b) (Supp. 1993) (FTC regulations).

58. 58 Fed. Reg. 44,773 (1993). 57 C.F.R. § 64.1510 was added effective November 1, 1993. 58 Fed. Reg. 44,773.

59. 59 Fed. Reg. 46,769 (1994).

60. See 47 C.F.R. § 64.1501-.1515 (1993); 59 Fed. Reg. 46,769 (1994).

61. For simplicity's sake, this Comment will speak only in terms of "contracts" and not "tariffs." Although the definition of "pay-per-call services" seems semi-intuitive, the FCC regulations provide a precise definition:

(a) pay-per-call service means any service:

(1) In which any person provides or purports to provide:

(i) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(2) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(3) Which is accessed through use of a 900 telephone number.

59 Fed. Reg. 46,769, 46,770 (1994) (to be codified at 47 C.F.R. § 64.1501(a)). Not included in the term "pay-per-call service" are:

directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service the charge for which is tariffed, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

59 Fed. Reg. 46,769, 46,770 (1994) (to be codified at 47 C.F.R. § 64.1501(a)(4)).

62. 47 C.F.R. § 1502 (1993). Title I of the TDDRA directs the FCC to enact regulations concerning the obligations of common carriers and consumer rights in pay-per-call transactions. See 47 U.S.C. § 228 (Supp. 1993). Title II directs the FTC to regulate the unfair and deceptive acts of pay-per-call providers. See 15 U.S.C. § 5711 (Supp. 1993). Title III

who does not comply with the rules and regulations of the pay-per-call industry shall have its information services terminated following written notice.<sup>63</sup> The information provider must be given seven to fourteen days notice to bring the program into compliance, and the program must be terminated immediately if compliance is not achieved by the end of the notice period.<sup>64</sup>

The contract between the common carrier and the service provider must also prohibit the service provider from using a telephone number widely believed to be toll free (for example, an 800 number) in a manner that would cause the caller to be assessed a charge, unless the calling party had a presubscription agreement with the service provider.<sup>65</sup> A nonpresubscription pay-per-call provider offering interstate services must use a 900 number.<sup>66</sup>

### C. Federal Trade Commission Regulations

The FTC regulations of the pay-per-call industry became effective on August 9, 1993.<sup>67</sup> Although the FCC's regulations impact the use of pay-per-call legal advice lines, the FTC's regulations have a much greater influence on the means by which a lawyer may use a pay-per-call service to market legal services. The FTC's regulations also have a greater punitive effect on the industry's bad actors, because the

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commands the FTC to regulate the billing and collection of pay-per-call accounts. See 15 U.S.C. § 5721-24 (Supp. 1993).

63. 47 C.F.R. § 64.1503 (1993).

64. *Id.*

65. *Id.* § 64.1504(a)-(c). A "presubscription agreement" is a contractual agreement in which:

- (1) The service provider clearly and conspicuously discloses to the consumer all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;
- (2) The service provider agrees to notify the consumer of any future rate changes;
- (3) The consumer agrees to utilize the service on the terms and conditions disclosed by the service provider;
- (4) The service provider requires the use of an identification number or other means to prevent unauthorized access to the service by nonsubscribers; and
- (5) Disclosure of a credit or charge card number, made during the course of a call to an information service shall constitute a presubscription or comparable arrangement if the credit or charge card is subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act . . . .

*Id.* § 64.1501(b)(1)-(2).

66. 59 Fed. Reg. 46,769, 46,770 (1994) (to be codified at 47 C.F.R. § 1506).

67. 58 Fed. Reg. 42,400 (1993).

regulations provide that information providers who violate any federal laws or regulations will be liable for refunds to consumers who have paid for their pay-per-call services.<sup>68</sup>

### 1. Cost Disclosure in Advertisements

The FTC regulations require that the "provider of pay-per-call services,"<sup>69</sup> in most cases, "clearly and conspicuously" disclose the cost of the call in advertisements.<sup>70</sup> The disclosure requirement differs depending on whether the pay-per-call service offers a flat fee,<sup>71</sup> a variable fee depending on the length of the call,<sup>72</sup> or a variable per minute fee depending on the service selected.<sup>73</sup> The advertisement also must state all other charges associated with the call. Additionally, if the caller might be transferred to another 900 number, the advertisement must state the costs associated with this other number.<sup>74</sup>

The FTC clarifies its advertising regulations by defining the term "clearly and conspicuously." The information provider must disclose the cost in the same language that is used in the rest of the advertisement.<sup>75</sup> The cost of the service must be shown in "a color or shade that readily contrasts with the background" in a television or print advertisement.<sup>76</sup> When the cost is disclosed orally, the delivery must

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68. 16 C.F.R. § 308.5(k) (1994).

69. "Provider of pay-per-call services means any person who sells or offers to sell a pay-per-call service." *Id.* § 308.2(g).

70. *Id.* § 308.3(b)(1). The rules provide very limited instances in which a pay-per-call provider is required in an advertisement to clearly and conspicuously disclose that a call "may result in a substantial charge." *Id.* § 308.4(a). Specifically, the exception only applies when the advertisement is in a publication that is "(1) Widely distributed; (2) Printed annually or less frequently; and (3) One that has an established policy of not publishing specific prices in advertisement." *Id.* § 308.4(c).

71. "If there is a flat fee for the call, the advertisement shall state the total cost of the call." *Id.* § 308.3(b)(1)(i).

72. 16 C.F.R. § 308.3(b)(1)(ii) provides:

If the call is billed on a time-sensitive basis, the advertisement shall state the cost per minute and any minimum charges. If the length of the program can be determined in advance, the advertisement shall also state the maximum charge that could be incurred if the caller listens to the complete program.

73. 16 C.F.R. § 308.3(b)(1)(iii) provides:

If the call is billed on a variable rate basis, the advertisement shall state . . . the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on the options chosen by the caller.

74. *Id.* § 308.3(b)(1)(iv)-(v).

75. *Id.* § 308.3(a)(1).

76. *Id.* § 308.3(a)(2).

be “slow and deliberate”<sup>77</sup> and in a “reasonably understandable volume.”<sup>78</sup> In addition, the cost must be disclosed at least three times in any “program length commercial”<sup>79</sup>—near the start, middle, and end.<sup>80</sup>

In a television advertisement, the cost disclosure must appear adjacent to and for the same length as the 900 number,<sup>81</sup> and the letters and numbers displaying the cost must be at least half the size of the phone number.<sup>82</sup> The cost of the service also must be disclosed audibly one time in concurrence with the cost appearing on the screen, except when the advertisement lasts fifteen seconds or less and the pay-per-call number is never sounded out, or when the advertisement does not orally present the pay-per-call service.<sup>83</sup> When a commercial does not visually show the 900 number, the cost must be stated immediately after the first and last oral presentation of the phone number, except that the cost disclosure must follow every presentation of the 900 number in a program-length commercial.<sup>84</sup>

The size and location requirements of the cost disclosure in print advertisements are the same as the size and location requirements in television advertisements.<sup>85</sup> In radio advertisements, the cost must be stated at least once, immediately after the first delivery of the 900 number.<sup>86</sup> In telephone messages that solicit calls to a 900 service, the

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77. “*Slow and deliberate manner* means at a rate that renders the message intelligible to the receiving audience, and, in any event, at a cadence or rate no faster than that principally used in the advertisement or the pay-per-call service.” *Id.* § 308.2(j).

78. *Id.* § 308.3(a)(4). “*Reasonably understandable volume* means at an audible level that renders the message intelligible to the receiving audience, and, in any event, at least the same audible level as that principally used in the advertisement or the pay-per-call service.” *Id.* § 308.2(h).

79. “*Program-length commercial* means any commercial or other advertisement fifteen (15) minutes in length or longer or intended to fill a television or radio broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer.” *Id.* § 308.2(g).

80. *Id.* § 308.3(a)(6).

81. *Id.* § 308.3(b)(2)(i). If more than one phone number with the same cost appears on the screen at the same time, the cost needs only to appear next to the largest presentation of the pay-per-call number. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* See *supra* note 79 for a definition of “program-length commercial.”

85. See 16 C.F.R. § 308.3(b)(2)(iii).

86. *Id.* In program-length radio commercials, the cost must be stated immediately after every articulation of the telephone number. *Id.*

pay-per-call service provider must ensure that the cost of the 900 call is disclosed on the message.<sup>87</sup>

## 2. Preamble Requirement

Under the FTC regulations, pay-per-call legal advice lines are required to include an introductory disclosure message ("preamble") with their services.<sup>88</sup> These advice lines may allow frequent callers to bypass the preamble, however, after their first phone call.<sup>89</sup>

The preamble must clearly identify the information provider, describe the service provided, and specify the cost of the service.<sup>90</sup> The preamble must inform the caller that minors must have parental or guardian permission to call.<sup>91</sup> The preamble also must advise the caller that charges for the call start three seconds after a signal indicating the close of the preamble, and that the caller can avoid charges by ending the call prior to the expiration of the three second period.<sup>92</sup> If the caller hangs up prior to the expiration of the three second period, the information provider cannot charge the customer for the call,<sup>93</sup> if the caller stays on the line, the information provider cannot charge a rate in excess of the rate stated in the preamble, and the assessment of charges must cease immediately upon termination of the call.<sup>94</sup>

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87. *Id.* § 308.3(h). The disclosure must be in a "slow and deliberate manner" and in a "reasonably understandable volume." For a definition of these terms, *see supra* notes 77-78.

88. *See* 16 C.F.R. § 308.5(a). The preamble must be spoken in a "slow and deliberate manner" and in a "reasonably understandable volume." For definitions, *see supra* notes 77-78. The regulations do not require the service to provide a preamble, however, when the entire fee for the call will be \$2.00 or less. 16 C.F.R. § 308.5(c).

The preamble concept is not new to the pay-per-call industry. Prior to the FTC regulations, American Telephone and Telegraph Co. required information providers to provide a preamble for programs that cost more than \$5 per minute or \$10 per call, and MCI Communications Corp. required a 12-second preamble for pay-per-call programs with the exception of short polling programs. Edward T. Hearn, *Congress Gets Busy on 900-number Abuse*, CHI. TRIB., July 1, 1991, at C3.

89. *See* 16 C.F.R. § 308.5(e). The pay-per-call provider must disable the caller's bypass mechanism, however, for a period of at least 30 days following a change in the rate charged or nature of the service. *Id.*

90. *Id.* § 308.5(a)(1)-(2)(i). The cost of the service must be stated in the same way that it needed to be stated in advertisements. *See supra* notes 71-73; 16 C.F.R. § 308.5(a)(2)(i)-(iv).

91. *Id.* § 308.5(a)(4).

92. *Id.* § 308.5(a)(3). The information provider does not need to grant a three second delay, however, if the caller is allowed to accept the charges by some affirmative method, such as pressing a key on the telephone. *Id.* § 308.5(b).

93. *Id.*

94. *Id.* § 308.5(f)-(g).

### 3. Restrictions on Solicitation of Minors

The FTC regulations also place limits on an attorney's ability to seek telephone clients who are under the age of eighteen.<sup>95</sup> Advertisements of pay-per-call services aimed primarily at minors must contain a disclosure that all persons under eighteen must obtain the permission of a parent or legal guardian prior to calling the 900 service.<sup>96</sup> The regulations consider the following advertisements as directed toward minors: any pay-per-call commercial appearing during or immediately before or after programming that has an audience composed mostly of individuals under eighteen, and any advertisement appearing in a publication read by more minors than adults.<sup>97</sup> If the audience composition or readership data shows that the medium's audience does not consist of an under eighteen majority, the FTC then considers a variety of factors to determine whether the advertisement is nonetheless directed primarily at individuals under eighteen.<sup>98</sup>

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95. Attorneys, as well as all others, are prohibited from directing advertisements toward children under the age of 12, unless the program is a bona fide educational service. *Id.* § 308.3(e). Because even the most unscrupulous of attorneys probably will not stoop to soliciting children under 12, the discussion of these regulations here is limited.

96. *Id.* § 308.3(f)(1). This disclosure's "clear and conspicuous" appearance requirement is substantially similar to the "clear and conspicuous" disclosures required in other types of pay-per-call advertising. *See id.* § 308.3(f)(2).

97. *Id.* § 308.3(f)(3). The demographic data of the medium used for advertising should come from a competent and reliable source. *Id.*

98. *Id.* § 308.3(f)(4). The Commission considers:

(i) Whether the advertisement appears in publications directed primarily to individuals under 18, including, but not limited to, books, magazines, and comic books;

(ii) Whether the advertisement appears during or immediately adjacent to television programs directed primarily to individuals under 18, including, but not limited to, mid-afternoon weekday television shows;

(iii) Whether the advertisement is broadcast on radio stations that are directed primarily to individuals under 18;

(iv) Whether the advertisement appears on a cable or broadcast television station directed primarily to individuals under 18;

(v) Whether the advertisement appears on the same video as a commercially-prepared video directed primarily to individuals under 18, or preceding a movie directed primarily to individuals under 18 shown in a movie theater; and

(vi) Whether the advertisement, regardless of when and where it appears, is directed primarily to individuals under 18 in light of its subject matter, visual content, age of models, language, characters, tone, message [sic], or the like.

*Id.* § 308.3(f)(4)(i)-(vi).



#### 4. Miscellaneous Provisions

If a legal information line plans to provide information on a federal program, the advertisements and preamble for the line must disclose that the pay-per-call service is not endorsed, approved, or authorized by any federal agency.<sup>99</sup> Although the scope of this provision has not been ascertained, legal advice lines that offer advice on federal programs such as Social Security probably would fall under these regulations.

The regulations also prevent pay-per-call legal information lines from using an 800 number or any other reputed toll-free number in most circumstances.<sup>100</sup> These numbers are prohibited from use if the caller is assessed a charge for the call or if the caller is connected or transferred to a pay-per-call service.<sup>101</sup> A pay-per-call service can use an 800 number only when the calling party has a presubscription agreement with the service.<sup>102</sup>

The creators of fee-driven legal hotlines also have duties with regard to the billing statements for their clients. First, the service provider must ensure that the billing statements show pay-per-call charges in a segment of the customer's bill that is marked as not being related to long distance and local phone charges.<sup>103</sup> Further, the bill must specify, for each individual charge, the type of service, the fee, the time and date of the call, and, for time-sensitive billings, the length of the call.<sup>104</sup> Finally, the bill must include the toll-free or local number through which customers can receive assistance regarding their use of 900 numbers and obtain the address of the service provider.<sup>105</sup>

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99. *Id.* § 308.5(a)(5) (1994) (preamble); § 308.3(d) (advertisements). The clear and conspicuous requirements of this disclosure are stated at 16 C.F.R. § 308.3(a), (d)(2)(i)-(iii). Any advertisement that contains "a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any Federal government connection, approval, or endorsement" is considered an advertisement providing information on a federal program for purposes of this regulation. *Id.* § 308.3(d)(1).

100. *Id.* § 308.5(i).

101. *Id.* § 308.5(i)(1)-(2).

102. *Id.* § 308.5(i)(3). For a definition of presubscription agreement, see *supra* note 65.

103. 16 C.F.R. § 308.5(j)(1).

104. *Id.* § 308.5(j)(2).

105. *Id.* § 308.5(j)(3).

## V. ETHICAL IMPLICATIONS OF ATTORNEY'S USE OF A 900 NUMBER<sup>106</sup>

David Dubin, Secretary of the New Jersey Supreme Court Committee on Attorney Advertising, presents one view on the ethical implications of an attorney establishing a pay-per-call legal advice line:

If done correctly, it is ethical, but there are a lot of things you have to consider before going forward with it. It's a potential minefield in that there are so many potential legal liability and ethical problems that an attorney should really give a lot of thought to . . . before actually contacting the phone company.<sup>107</sup>

Attorneys must avoid many ethical pitfalls when offering legal services through a 900 number.<sup>108</sup> This section will address these problems.<sup>109</sup>

### A. Establishment of Attorney-Client Relationship

Many ethical restraints placed on an attorney's actions commence upon the establishment of the attorney-client relationship.<sup>110</sup> There-

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106. Although every state's ethics code has its nuances, most codes are based on either the American Bar Association Model Rules of Professional Conduct or the American Bar Association Code of Professional Responsibility. This Comment will therefore focus on the ABA's ethical guidelines.

107. Dana Coleman, *Need Fast Legal Advice? Just Call a 900 Number*, N.J. LAW., May 2, 1994, at 1.

108. Although pay-per-call legal advice hotlines are the equivalent of ethical dodgeball, they are not per se unethical. Bar associations in Alabama (Alabama Bar Opinion 91-24, Nat'l Rep. on Legal Ethics & Prof. Resp. (1991)), Kansas (Kansas Bar Opinion 92-06, Nat'l Rep. on Legal Ethics & Prof. Resp. (1992)), Los Angeles (Los Angeles Bar Opinion 449, Law. Man. on Prof. Conduct 901:1703 (ABA/BNA)), New Jersey (New Jersey Committee on Attorney Advertising Opinion 17, N.J.L.J., April 25, 1994, at 66), New York (New York Bar Opinion 664, N.Y.L.J., July 11, 1994, at 1), Ohio (Ohio Bar Opinion 92-10, Nat'l Rep. on Legal Ethics & Prof. Resp. (1993)), and Philadelphia (Philadelphia Bar Opinion 91-15, Nat'l Rep. on Legal Ethics & Prof. Resp. (1991)), have approved of the practice. Only the Ethics Advisory Service at the John Marshall Law School has categorically prohibited the practice. See Laura Duncan, *Marshall Ethics Panel Draws Praise*, CHI. DAILY L. BULL., Aug. 20, 1993, at 3.

109. An attorney working through a pay-per-call service faces the same ethical dilemmas that all lawyers encounter in addition to the ethical issues special to selling legal services through a 900 number. This section will focus specifically on the latter.

110. For example, an attorney's duty to act competently and duty to avoid conflicts of interests are contingent upon establishment of an attorney-client relationship. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.7 (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1981) [hereinafter MODEL CODE]. For a further discussion of the importance of the attorney-client relationship, see Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209 (1986).

fore, it must be determined whether a caller's contact with a legal advice line creates an attorney-client relationship before the other ethical implications of pay-per-call lines are discussed.

Courts have historically used contract law and principles of agency to determine whether an attorney-client relationship has been established.<sup>111</sup> Using this analysis, courts ordinarily conclude that the attorney-client relationship arises when an attorney agrees to act for the benefit of the client and the client consents to the attorney's representation.<sup>112</sup>

The establishment of the attorney-client relationship does not need to be evidenced by formalities<sup>113</sup> or a written agreement.<sup>114</sup> Without a written agreement, courts generally hold that an attorney-client relationship exists when the client subjectively believes that an attorney-client relationship exists and relies on the advice given by the attorney.<sup>115</sup>

Several bar associations have advised that a legal advice line establishes an attorney-client relationship between the caller and the attorney answering the call.<sup>116</sup> These opinions premise their conclusions on two factors. First, callers to advice lines intend to rely on the advice that is given. Because the callers intend to rely on the advice, they will reveal the information to the attorney that is necessary for informed guidance to be given, and therefore will expect the information and advice to be protected by the attorney-client relationship.<sup>117</sup> Second, one opinion suggests that an attorney has no basis for collecting fees for legal advice without establishing an attorney-client relationship,

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111. See, e.g., *Brinkley v. Farmers Elevator Mut. Ins. Co.*, 485 F.2d 1283, 1286 (10th Cir. 1973); *Holland v. Lawless*, 623 P.2d 1004, 1008 (N.M. Ct. App. 1981), *cert. denied*, 624 P.2d 535 (N.M. 1981).

112. *Committee on Professional Ethics and Grievances v. Johnson*, 447 F.2d 169, 174 (3rd Cir. 1971); *Anderson v. Pryor*, 537 F. Supp. 890, 894 (W.D. Mo. 1982).

113. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Hashemi v. Shack*, 609 F.Supp. 391, 393 (S.D.N.Y. 1984).

114. *United States v. Constanzo*, 625 F.2d 465, 468 (3d Cir. 1980), *cert. denied*, 472 U.S. 1017 (1985); *Davis v. State Bar*, 655 P.2d 1276, 1279 (Cal. 1983).

115. *In re Petrie*, 742 P.2d 796, 801 (Ariz. 1987); *Louisiana State Bar Ass'n v. Bosworth*, 481 So. 2d 567, 571 (La. 1986); *State ex. rel. Slusser v. Billet*, 762 P.2d 350, 351 (Wash. Ct. App. 1988).

116. See, e.g., *New Jersey Comm. on Attorney Advertising Opinion 17*, N.J.L.J., Apr. 25, 1994, at 66; *Ohio Bar Association Ethics Opinion 92-10*; *Kansas Bar Association Ethics Opinion 92-06*.

117. *New Jersey Comm. on Attorney Advertising Opinion 17*. The committee also opines that a person would not pay \$240 per hour for advice that was not provided pursuant to an attorney-client relationship.

and, therefore, the attorney-client relationship is a necessary consequence of pay-per-call legal advice.<sup>118</sup>

### *B. Duty to Act Competently*

Attorneys are required to provide competent representation. To act competently, attorneys must have the knowledge and preparation reasonably necessary for the representation.<sup>119</sup>

The offering of legal advice through a 900 number provides three special problems when considering whether representation is competent. The first problem concerns the knowledge element of competence. Attorneys may be disciplined if they are unacquainted with well-settled principles of law relevant to their clients' problems or fail to discover these principles through reasonable research.<sup>120</sup> Because many legal advice lines propose to answer questions from a wide spectrum of legal disciplines, attorneys providing advice may not possess the knowledge reasonably necessary to answer the questions of all callers in a competent manner.

The second problem concerns the preparation element of competent representation. Attorneys should give advice in areas of law in which they are not qualified only when they can become qualified through research that would not cause their clients to experience unreasonable expenses or delays.<sup>121</sup> If attorneys fail to learn readily ascertainable points of law, they may be subject to disciplinary action.<sup>122</sup> Because many legal advice lines strive to answer questions quickly, their attorneys may not take the time to adequately research questions, and therefore may risk disciplinary action.

The third problem concerns the situation in which attorneys give advice that they later learn to be erroneous. In this situation, attorneys have a duty to contact their clients and correct their previous advice.<sup>123</sup>

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118. Kansas Ethics Opinion 92-06.

119. MODEL RULES 1.1; MODEL CODE DR 6-101.

120. See *Lewis v. State Bar*, 621 P.2d 258 (Cal. 1981); *People v. Yoakum*, 552 P.2d 291, 293-94, 97 (Colo. 1976); *The Florida Bar v. Terry*, 333 So. 2d 24 (Fla. 1976); *Louisiana State Bar Ass'n v. Gremillion*, 320 So. 2d 171 (La. 1975); *Nebraska State Bar Ass'n v. Holscher*, 230 N.W.2d 75, 79 (Neb. 1975). An attorney must research a matter to the same extent that an attorney employed in similar matters would to reach an informed decision. See *Smith v. Lewis*, 530 P.2d 589, 593 (Cal. 1975); *Hughes v. Malone*, 247 S.E.2d 107, 110-11 (Ga. Ct. App. 1978).

121. See MODEL CODE EC 6-3.

122. See *Oklahoma Bar Ass'n v. Hensley*, 661 P.2d 521 (Okla. 1983).

123. See MODEL RULE 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter . . .") and MODEL CODE EC 9-2 ("a lawyer should fully and promptly

In the typical law firm setting, attorneys will be in a position to know their clients' phone numbers and inform their clients of any mistakes in the advice given. However, callers to legal advice lines ordinarily will not be regular clients of the firm, and therefore service providers probably will not have their callers' phone numbers available. Accordingly, attorneys probably will need to ask the callers for their phone numbers. Expecting the caller to redial the 900 number for corrected advice may be an improper churning of fees.<sup>124</sup>

The New York State Bar Association has recommended several precautions that a legal advice line should take to avoid acting incompetently.<sup>125</sup> First, the attorney should inform the caller that some legal issues may be too complicated to answer concisely and completely over the telephone.<sup>126</sup> Next, the attorney should inform the caller whether the advice given is generally applicable or specifically tailored to the client's situation. The attorney also should inform the caller that advice cannot be provided during the initial phone call if the attorney needs to review documents or conduct additional research. Finally, if the caller needs to take steps in addition to the telephone consultation (e.g. have documents prepared, initiate a lawsuit, etc.), the attorney should advise the caller of these steps.<sup>127</sup>

### C. *Conflicts of Interest*

A lawyer is generally prohibited from representing a client whose interests are adverse to another client or whose representation would be materially limited because of the lawyer's responsibilities to another

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inform his client of material developments in the matters being handled for the client") in addition to the ethics guidelines regarding competence.

124. See Kansas Ethics Opinion 92-06. For a discussion of fees, see *infra* notes 134-45 and accompanying text.

125. Attorneys presumably have the authority to take the first three precautions listed because of MODEL RULE 1.2(c), under which "[a] lawyer may limit the objectives of the representation if the client consents after consultation," or MODEL CODE DR 7-101(B)(1), under which a lawyer may, "where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." If attorneys take these precautions while the "meter is running," they may be charging an unreasonable fee to the client. For a discussion of this and other fee-related issues, see *infra* notes 134-45 and accompanying text.

126. Lawyers may limit the scope of their representation if the representation is adequate to supply the client with practical assistance, is not prejudicial to the administration of justice, and does not substantially impair the client's rights. New York Bar Opinion 664. Lawyers must also explain to their client that the limitation might require the client to talk to a different lawyer about the same subject matter. *Id.*

127. *Id.*

client.<sup>128</sup> In addition, a lawyer who has represented a client in a matter is prohibited from representing a different client in the same matter or a substantially related matter without the consent of the original client.<sup>129</sup>

The issue of conflicts of interest becomes a problem in legal advice lines because the attorney may not envision the existence of an adverse party when attempting to give generalized information. Therefore, even though the information is generalized, the attorney must screen for conflicts before answering the client's question.<sup>130</sup>

Although some legal hotlines limit the scope of advice to ensure competence, the rules regarding conflicts of interests cannot be avoided by similar limitations.<sup>131</sup> The client's protection under conflicts of interest principles can be waived only in the special situations that the rules provide.<sup>132</sup>

#### *D. Reasonableness of Fees*

Depending on the ethics guidelines that a particular jurisdiction uses, an attorney's fees must be either reasonable<sup>133</sup> or not clearly excessive.<sup>134</sup> Factors to consider in determining the reasonableness of a fee include the time and skill required to properly give legal advice, the locality's standard fee for similar advice, the results obtained, the time limit in which advice must be given, and the experience and ability of the attorney giving the advice.<sup>135</sup>

The use of a 900 number to provide legal advice presents several problems regarding the reasonableness of the fee charged. First, the fee charged to a legal advice caller is contingent only on the duration of the call, and no other relevant factors are considered. Because the skill required and results obtained will vary from call to call, the fee charged

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128. MODEL RULE 1.7; MODEL CODE DR 5-105. Attorneys can avoid this prohibition if they reasonably believe that their clients will not be adversely affected and their clients consent after consultation. See MODEL RULE 1.7; MODEL CODE DR 5-105.

129. MODEL RULE 1.9(a); see generally MODEL CODE EC 4-6.

130. Kansas Bar Opinion 92-06; Ohio Bar Opinion 92-10; New Jersey Committee on Attorney Advertising Opinion 17.

131. Kansas Bar Opinion 92-06.

132. MODEL RULE 1.5(a).

133. *Id.*

134. MODEL CODE DR 2-106(A).

135. MODEL RULE 1.5(a); MODEL CODE DR 2-106(B).

to answer simple questions or for unanswered questions may be excessive.<sup>136</sup>

A second problem occurs when the caller has a question that is outside the scope of the 900 service. If a hotline is unable to answer a question because of its difficulty, the caller will still be billed for the time that it took the attorney to determine that the question was unanswerable. The Kansas Bar Association has concluded that incurring a fee from an attorney who is not competent to give advice on a legal issue is paying an unreasonable fee under the ethics code.<sup>137</sup> As a consequence, the legal line must refund the client for the cost of this call to avoid a violation of Model Rule 1.5 or Model Code DR 2-106.<sup>138</sup>

Attorneys face a similar problem when screening for conflicts of interest.<sup>139</sup> Because attorneys do not render legal services during conflicts checks, any client billing during these checks is unreasonable.<sup>140</sup> Therefore, clients must not be billed for this period or must be refunded for any charge incurred during the conflicts check.<sup>141</sup>

A final problem occurs when a legal advice line advertises a maximum call length or maximum fee. Some situations may occur in which attorneys cannot sufficiently answer their callers' questions in the designated time period. In this situation, attorneys must take additional time to adequately answer their clients' questions, free of charge.<sup>142</sup> Attorneys cannot charge an additional amount because they are prohibited from assessing fees in addition to the initially agreed upon maximum amount.<sup>143</sup> Attorneys cannot terminate their calls because

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136. See New York Bar Opinion 664. Although the method of billing that legal advice lines use (hourly) has been criticized as awarding inefficient legal service, the method is the legal profession's principal determinant of legal fees. *Id.* For a discussion of the propriety of hourly billing, see William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991); Jeff Tolman, *Let's Ban Billing by the Hour*, 14 LEGAL ECON. 48 (Sept. 1988); Paul D. Freeman, *Is Hourly Billing Obsolete?*, 10 CAL. LAW. 52 (Feb. 1990); Dianne Molvig, *Breaking Away from the Billable Hour*, 64 WIS. LAW. 8 (Sept. 1991); Michelle Bates, *Has Time Run Out for the Billable Hour?*, 31 LAW OFF. ECON. & MGMT. 375 (1991).

137. Kansas Bar Opinion 92-06.

138. In addition, an attorney is required to refund any advance payment of fees that has not been earned under both MODEL RULE 1.16(d) and MODEL CODE DR 2-110(A)(3).

139. See *supra* notes 128-32 and accompanying text for a discussion of conflicts of interest.

140. Kansas Bar Opinion 92-06. Many lawyers ordinarily do not charge for initial consultations to avoid this problem. *Id.*

141. See *supra* note 138.

142. Kansas Bar Opinion 92-06.

143. *Id.*

clients must be fully informed of any adverse consequences.<sup>144</sup> If the calls are terminated before adequate advice is given, the fees must be returned to the clients.<sup>145</sup>

The ethical problems underlying the reasonableness of fees encountered by attorneys offering services through pay-per-call legal advice lines probably outweigh any advantage that the lines offer to either the public at large or the attorney's own pocketbook. The first problem concerns the fees generated while fielding unanswerable questions or screening conflicts. Because the collection of these fees is unethical, an attorney must devise a system in which these fees are not collected or are returned to the customer.

A system in which the fees are not collected would probably be burdensome to both the service provider and to the callers. Because the meter of a 900 number service starts running at the close of the preamble, the attorney cannot screen conflicts or determine competency during the call to the 900 number. Instead, the caller would need to call a different, toll-free number first in order for the attorney to determine his or her competence to answer the question and any conflicts of interest. If the attorney determines that the question is answerable, the caller would then need to call the 900 service to receive the answer to the question.<sup>146</sup> This system would inconvenience callers because of their need to call two different numbers, thus mitigating one advantage of pay-per-call lines: their convenience. This system also probably would increase the legal line's expenses because of the need to monitor two numbers and the need to keep track of the customers that have been cleared on the toll-free line when answering the 900 number. This increased expense would lessen profits, thus minimizing another advantage of legal advice lines.

A system in which fees are returned to the caller, although less burdensome on the caller, probably poses more problems for the attorney. First, the attorney would be responsible for taking the necessary steps with the phone company to delete the bill from the customer's account every time a conflict or competency problem arose. This process would consume time that an attorney would otherwise

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144. *Id.*

145. *See supra* note 138.

146. Although a more convenient method would be to directly connect or transfer the customer to the 900 line, this practice has been prohibited by FCC regulations. *See supra* notes 104-06 and accompanying text.



spend on fee-generating activities, thus eliminating some of the profitability potential of the legal advice line.

The second problem concerns the probability that legal advice lines will not delete fees earned while screening conflicts or determining competency. An attorney might not delete these bills for a number of reasons, including: (1) the time spent deleting the bill could be spent in fee-generating activities; (2) the deletion of the bill will directly decrease the revenues of the advice line; (3) the customer might assume that incurring fees for time spent screening conflicts and determining competency is a necessary expense of calling a pay-per-call legal advice line; and (4) the customer might not be aware of the attorney's ethical obligation to charge a reasonable fee. Because a strong probability exists that an attorney will not delete a falsely-charged fee, the probability also exists that an attorney will commit an ethics violation by charging an unreasonable fee. As a result, potential legal advice providers should use great caution in deciding whether to establish a 900 line.

### *E. Advertising*

The ethics guidelines prohibit attorneys from making false or misleading communications about their services.<sup>147</sup> A communication is considered misleading if it is likely to create in a client an unjustified expectation about the results that the attorney can achieve.<sup>148</sup> Because of the nature of pay-per-call legal services, attorneys must use great caution in designing advertisements regarding their audiotext services to avoid making false or misleading statements.

The most prominent problem that legal advice lines probably will encounter is the overzealous extolling of their capabilities to answer legal questions. Although inherent in the concept of 900 number advertising is the dramatization of the service's value, legal advice lines must avoid advertising that all legal questions can be answered, even if the line only specializes in one area. Because some clients must be turned away due to complex questions or conflicts of interest, all questions cannot be answered, and any advertisement stating such is misleading and in violation of the ethics code.<sup>149</sup>

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147. MODEL RULE 7.1; MODEL CODE DR 2-101.

148. MODEL RULE 7.1(b).

149. Virginia Ethics Opinion 1328, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 901:8769 (1990).

*F. Malpractice Insurance and Prospective Limitation of Liability*

Because pay-per-call legal advice providers are unable to obtain malpractice insurance,<sup>150</sup> these providers have significant exposure to loss in lieu of any other means of risk management. A few legal advice lines have attempted to avoid this exposure to loss by announcing a disclaimer of malpractice liability in the preamble to their services.<sup>151</sup>

Under Model Rule 1.8(h), attorneys cannot prospectively limit their liability for malpractice, unless (1) this limitation of liability is authorized by law, and (2) the client is independently represented in agreeing to the limitation of liability.<sup>152</sup> Both the New Jersey Committee on Attorney Advertising and the Kansas Bar Association have ruled that this provision prohibits a legal advice line from avoiding malpractice liability.<sup>153</sup> The New Jersey Committee also invalidated these disclaimers because they contravene established law and public policy.<sup>154</sup>

The inability of legal advice lines to proscribe malpractice liability is the foremost problem for pay-per-call providers. Pay-per-call legal advice providers may be subject to malpractice liability if they fail to fulfill their duty to provide diligent and competent representation. Under this duty, an attorney must exhibit the minimum amount of legal judgment, skill, and knowledge that is shown by other attorneys in comparable situations, and use reasonable care in applying that legal judgment, skill, and knowledge to legal matters entrusted to the attorney's care.<sup>155</sup>

A legal advice line is more likely to provide incompetent representation than a traditional law firm because of the line's purpose to offer

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150. See *supra* note 50 and accompanying text.

151. One example of such a disclosure reads:

Legal problems frequently involve complex issues. This service is intended to provide broad answers to questions of a general nature. It is not intended to substitute for an in depth consultation with an attorney that many legal problems require[;] therefore, the providers of this service cannot accept responsibility for the answers or advice provided. You should consult with an attorney of your choice prior to taking any action based upon the answers or advice given.

New Jersey Committee on Attorney Advertising Opinion 17 [hereinafter New Jersey Opinion 17].

152. MODEL CODE DR 6-102 similarly prohibits an attorney from limiting malpractice liability.

153. See New Jersey Opinion 17; Kansas Bar Association Ethic Opinion 62-06.

154. New Jersey Opinion 17.

155. See, e.g., *Theobald v. Byers*, 13 Cal. Rptr. 864, 866 (1961); *Watkins v. Sheppard*, 278 So. 2d 890, 892 (La. App. 1973); *Hizey v. Carpenter*, 830 P.2d 646 (Wash. 1992).

quick legal advice from a wide spectrum of legal disciplines. This probability of incompetent representation is evidenced by the attempts of several pay-per-call legal advice providers to limit malpractice liability and by the refusal of malpractice liability insurance carriers to insure pay-per-call legal advice lines.

The exposure of an advice line to malpractice liability greatly jeopardizes the continuing financial viability of these lines. In addition, if these lines become fly-by-night operations that rise and fall with each malpractice claim, users of the lines will become increasingly distrustful of the legal profession. Assuming these users are middle-class citizens, the advice lines will have failed to achieve their goal of bringing the middle-class into the legal marketplace. Because of these disadvantages, lawyers should resist the temptation to establish a 900 service.

#### VI. 1-900-LAWYERS AND THE INTEGRITY OF THE LEGAL PROFESSION

Although the factors that attorneys consider in deciding whether to establish a pay-per-call legal advice line are probably self-centered, these attorneys also need to consider the reputation of the legal profession when making their decisions. The legal profession's image in the eyes of the public probably will diminish when legal services are peddled through a medium that is associated with dial-a-porn; therefore, attorneys should avoid establishing 900 services for the sake of the legal profession.

Recent surveys by both the American Bar Association and *The National Law Journal* demonstrate that attorneys need to have concern about the image of their profession. When the public was asked which profession deserves the most respect, teachers attained 36% of the vote, followed by doctors at 24% and the clergy at 19%. Only 2% of the respondents thought that lawyers deserve the most respect.<sup>156</sup> When asked which professions deserve a favorable rating, respondents answered teachers 84% of the time, pharmacists 81%, police officers 79%, doctors 71%, accountants 60%, and bankers 56%. The 40% rating for lawyers was superior only to the 28% rating for stockbrokers and 21% for politicians.<sup>157</sup> Unless lawyers want to be thought of as being

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156. Randall Samborn, *Anti-Lawyer Attitude Up*, THE NAT. L. J., Aug. 9, 1993, at 1.

157. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A.J., Sept. 1993, at 60.

in the same class as junk bonds and Watergate, they need to do something about the image of their profession.

These recent surveys also show that pay-per-call legal information lines probably harm the image of the legal profession, and conversely, that their absence may enhance the profession's image. When asked "What do you think lawyers can do to improve their image?," respondents most commonly answered: (1) "be more honest" or "ethical"<sup>158</sup> and (2) "charge less" or "be less greedy."<sup>159</sup> Because pay-per-call legal advice lines increase the probability that attorneys will act unethically,<sup>160</sup> their absence arguably will lead to more ethical behavior, and consequently enhance the public's image of the legal profession. In addition, because 900 number operations generally have a profit motive, the absence of pay-per-call legal advice lines might cause the public to perceive attorneys to be less greedy, thereby enhancing the profession's image.

In response to the allegation that pay-per-call legal advice lines will cast a bad light on the legal profession, some may argue that the recently enacted regulations of the pay-per-call industry will remove the abuses of the industry, and therefore remove the industry's stigma. Although the regulations will mitigate the industry's abusive practices toward children, minors, and other consumers unwitting of the potentially outlandish fees of pay-per-call services,<sup>161</sup> these regulations are unable to remove from the pay-per-call industry the 900 services that contribute most heavily to its tarnished image: the providers of dial-a-porn.

It is not as if Congress has no desire to eliminate dial-a-porn from the pay-per-call industry; in fact, in 1988 Congress attempted to prohibit "any obscene or indecent communication for commercial purposes to any person."<sup>162</sup> However, Congress failed to clear one hurdle in its race to curb sexually explicit phone services: the First Amendment. In *Sable Communications v. FCC*,<sup>163</sup> the United States Supreme Court ruled that although the First Amendment does not protect obscene

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158. This recommendation received 26% of the vote. Samborn, *supra* note 156, at 1.

159. *Id.*

160. See *supra* notes 106-53 and accompanying text.

161. See *supra* notes 40-42.

162. The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (codified as amended at 47 U.S.C. § 223(b) (1988)).

163. 492 U.S. 115 (1989).

speech,<sup>164</sup> Congress cannot proscribe indecent speech in the manner used in this legislation.<sup>165</sup> In response to Congress' argument that the legislation was intended to protect children from indecent pay-per-call services, the Court ruled that, although government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, the legislation needed to be more narrowly drawn to avoid infringing on the First Amendment's free speech protection.<sup>166</sup> As a result, the First Amendment prohibits indecent speech from being broadly proscribed, and consequently prevents Congress from categorically banning dial-a-porn, the black sheep of the pay-per-call industry.

Will the public's image of pay-per-call industry ever change so that legal advice lines can use 900 numbers to sell their services without tarnishing the legal profession's image? The answer to this question is probably yes, depending on several factors. First, the recently enacted regulations of the pay-per-call industry, although not prohibiting dial-a-porn, will remove many of the abuses of the industry so that the public's perception of 900 numbers probably will marginally improve. Second, as the number of non-perverse uses of 900 numbers increases,<sup>167</sup> the public probably will increasingly associate 900 numbers with these services and not with phone sex. Third, the telecommunications industry could provide an exchange other than 900 (e.g. dial 1-600-LAWYERS instead of 1-900-LAWYERS) for legitimate pay-per-call providers so that these providers can escape the stigma of dial-a-porn that comes with the 900 exchange. Fourth, society's tastes and values could improve to the point where the market for dial-a-porn providers becomes insubstantial, removing the phone sex image from the public's mind.

## VI. CONCLUSION

To the public, the image of the profession is determined by the conduct of every lawyer. When one of us fails, the profession in a small way fails as well. That's why the whole system requires of us dedicated commitment to the ideals [of the profession]

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164. *Id.* at 124.

165. *Id.* at 131.

166. *Id.* at 126. The Court characterized Congress' broad prohibition in the name of protecting children as "burn[ing] the house to roast the pig." *Id.* at 131 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

167. See *supra* notes 12-14 and accompanying text.

168. James S. Hill, *A Lawyer's Pledge*, A.B.A.J., Mar. 1992, at 98. Mr. Hill was the 1992 president of the North Dakota bar.

The whole system requires that attorneys avoid establishing pay-per-call legal advice lines. Although pay-per-call legal advice lines are legal and *per se* ethical, they should be avoided for two reasons. First, they increase the probability that attorneys will commit ethical violations, a serious problem considering the fact that malpractice insurance carriers refuse to cover the lines. Second, the legal profession's image will improve only when individual attorneys stop failing the profession; pay-per-call legal advice lines, because they use a medium associated with dial-a-porn providers, represent one of these failures.

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